



POSSESSION AS A NATURAL RIGHT

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What follows is, I hope, a tribute both to Friedrich Hayek, for whom this lecture series is named, and Richard Epstein, who was kind enough to invite me to give the lecture. Hayek has long been an inspiration for his insights about the advantages of decentralized decision making and the importance of information in understanding design of institutions. Both are recurring themes in my own work. Richard was my teacher at the University of Chicago Law School and has been a guiding light ever since. His works on nuisance law, takings, and the public trust doctrine, among others, have had a decisive influence on my thinking about property. Most relevant to today's lecture, his essay entitled *Possession as the Root of Title*¹ was the first piece of scholarship that got me thinking about the importance of possession, many years ago.

The lecture is divided into three roughly equal parts. The first part addresses natural rights, and how the explosion of knowledge currently taking place in genetics, neuroscience, and evolutionary

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¹ Richard A. Epstein, *Possession as the Root of Title*, 13 GA. L. REV. 1221 (1979).

biology may affect our thinking about natural rights. The second part addresses possession, and asks whether perceptions of possession and respect for possession established by others may be universal features of human nature, conditioned if not determined by our shared genetic endowment. The third part asks what implications this view of possession may have for property rights. I conclude with a thought about the much mooted question whether it is possible to speak of a natural right to property.

I.

There are obviously many theories of natural rights. What unites any conception of natural rights is the belief that these rights that belong to all persons, by reason of their humanity. They are, if you will, the universal rights of humankind. It is often said that natural rights are pre-political.² This is true in the sense that natural rights, being universal, exist at all times and places without regard to whether they are recognized or enforced by any particular political system. But natural rights would be of little value if they did not have some traction in the political world. The practical value of recognizing something as a natural right is that this serves as a basis for political and moral argument. The American Colonists justified their rebellion from English rule on the basis of an appeal to natural rights in the Declaration of Independence.³ Nation states, including the modern U.S., are occasionally moved to impose sanctions or even engage in military action against other nation states or terror groups based on appeals to stop their violation of natural rights.⁴

² *E.g.*, THOMAS HOBBS, *LEVIATHAN* 145-68 (Meridian Books, 1963) (1668).

³ "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights," *DECLARATION OF INDEPENDENCE* (1776).

⁴ For example, President Obama justified the initial American military support for rebels seeking to overthrow Libyan dictator Muammar Gaddafi based in part on violations of the Libyan peoples' "basic human rights." Nikki Sutton, *President*

Natural rights, in other words, are invoked as a type of *reason* for engaging in or desisting from political or individual action of one type or another. We know, based on history, that these appeals can be powerfully motivating.

Theories of natural rights come in many different flavors. Some are grounded in theology or divine revelation.⁵ Others are grounded in an imaginary social contract.⁶ More recently, natural rights tend to be called “human rights.”⁷ In this incarnation, natural rights are grounded in the consensus views of international law scholars about the minimal conditions required to sustain a “meaningful” human existence.⁸

I will focus on yet another tradition associated with natural rights, this one going back at least to Aristotle.⁹ This is the tradition that seeks to derive natural rights from an understanding of human nature. The idea is that there are certain traits or attributes common to all human beings, in all times and places, and that these common attributes or traits supply the foundation for our understanding of

Obama on Libya: The future is in the Hands of its People, WHITE HOUSE BLOG (Aug. 22, 2011, 5:20 PM), <https://www.whitehouse.gov/blog/2011/08/22/president-obama-libya-future-hands-its-people>.

⁵ E.g., 1 ST. THOMAS AQUINAS, *SUMMA THEOLOGIA I-II Q. 94* (Fathers of the English Dominican Province trans. 1947).

⁶ Hobbs, Locke, and Rousseau are generally cited as seeking to derive conceptions of natural right from an imagined social contract. See generally J.W. GOUGH, *THE SOCIAL CONTRACT* (Oxford U. Press, 1936). John Rawls is often regarded as a modern social contractarian. See JOHN RAWLS, *A THEORY OF JUSTICE* 118-92 (Harvard U. Press, 1971) (seeking to derive general principles of justice by reasoning about what persons would agree to in the “original position” behind a veil of ignorance about what station they would occupy in life).

⁷ THE UNITED NATIONS, *THE UNIVERSAL DECLARATION OF HUMAN RIGHTS* Art. 3 (1948) (“Everyone has the right to life, liberty and security of person”).

⁸ See CHRISTIAN TOMUSCHAT, *HUMAN RIGHTS: BETWEEN IDEALISM AND REALISM* (Oxford U. Press, 3d ed. 2014).

⁹ See Aristotle, *Nicomachean Ethics* and *Politics* in *THE BASIC WORKS OF ARISTOTLE* (Richard McKeon ed. 1941). Although Aristotle is not usually classified as a natural rights thinker, he sought to derive normative understandings of the virtuous life and the best form of political organization based on an understanding of human nature.

natural rights. In effect, any attempt to stamp out or suppress these traits or attributes would be contrary to natural rights, because contrary to human nature.

Historically, arguments attempting to derive natural rights from human nature have suffered from very limited knowledge about whether or to what extent there is any common denominator among all known human societies. The conception of human nature was largely if not entirely based on armchair speculation.

This may change. We are in the midst of an extraordinary explosion in knowledge about the human species. This explosion is being driven by rapid advances in a number of sciences -- most notably genetics, neuroscience, evolutionary biology, and experimental psychology.¹⁰ This research suggests that there is a significant biological basis to a great deal of human behavior. There is no claim that human behavior is strictly determined by biology. Culture clearly matters, and produces a great deal of diversity in human institutions. But evidence is mounting that human behavior is significantly shaped by the human genome, such that all human societies share certain commonalities, even if they exhibit tremendous variation in the way these commonalities manifest themselves.

Let me offer a concrete example of what I am talking about. Language is a feature common to all known human societies.¹¹ It is learned by children at an early age. The ability to use and comprehend language is centered in a particular part of the brain.¹² This capacity to learn languages almost certainly has a genetic basis.¹³ And all human languages share a common basic design. Neverthe-

¹⁰ See, e.g., EDWARD O. WILSON, ON HUMAN NATURE (Harvard U. Press, 2d ed. 2004); GREGORY COCHRAN & HENRY HARPENDING, THE 10,000 YEAR EXPLOSION: HOW CIVILIZATION ACCELERATED HUMAN EVOLUTION (Basic Books, 2009); PAUL H. RUBIN, DARWINIAN POLITICS 1-30 (2002).

¹¹ STEVEN PINKER, THE LANGUAGE INSTINCT: HOW THE MIND CREATES LANGUAGE (William Morrow, 1994).

¹² *Id.* at 299-317.

¹³ *Id.* at 45-54.

less it is unquestionably true that there are thousands of different languages, and that the speakers of one language do not comprehend what is being said (or written) by those using a different language. So it is fair to say that there is an ingrained human predisposition to learn and communicate using language, but the particular language of any human group will be a product of its history and culture.

The purpose of this article is not to discuss genetics, neurology, or evolutionary biology. I have no expertise that would give me any authority to speak on these matters. Instead, I will offer some tentative thoughts about the potential implications of what, to an outsider, appears to be a dramatic expansion in our collective knowledge about the biological foundations of human behavior, and in particular what this may mean for arguments based on human rights.

I will mention what seem to me to be three potentially attractive features of such a project, followed by two important qualifications.

The first positive implication is that a scientifically-grounded understanding of human nature might supply a more secure foundation for natural rights arguments. The traditional foundations for natural rights arguments are, to be frank, flimsy. Divine revelation may have worked at one time but it no longer commands widespread assent. Arguments based on the social contract theory are understood to be at most thought experiments. Modern discourse about human rights rests largely on the views of a small number of Western human rights activists, whose conception of the conditions needed to sustain a meaningful life bears a suspicious resemblance to the features of a modern Scandinavian social welfare state.

The emergence of vastly improved knowledge about the biological roots of human nature, in contrast, holds forth the promise of grounding natural rights in something much more solid – namely, science. With the anticipated emergence of vastly expanded knowledge about the biological foundations of human behavior, grounded in replicable scientific studies, the argument from human nature can put on a much more secure foundation than armchair speculation. As scientists gradually map out behaviors that are common to all human actors in all societies, it will become increas-

ingly plausible to describe the features of a universal human nature. This in turn will allow us to argue that public policies or individual actions that are opposed to these universal features of human nature are contrary to natural right.

The second positive implication is that grounding natural rights in human nature would be broadly supportive of human liberty. By human liberty, I mean liberty in the Hayekian sense – freedom from coercion.¹⁴ Clearly, most persons will feel coerced if threats of force are used to compel behavior inconsistent with human nature. Thus, if we can identify a set of natural rights grounded in human nature, these rights can be invoked to fend off action that most people would regard as coercive. We can put the matter another way. In order to induce people to engage in behavior contrary to human nature, it is probably necessary to use coercion. Arguments that would align government policy with the proclivities of human nature should therefore reduce the need for coercion.

The third positive implication is that a set of natural rights grounded in human nature should require little or no judicial intervention in a well-functioning democracy. The argument here is straightforward. If there is a set of natural rights grounded in universal proclivities of human nature, then a well-functioning democracy will nearly always adopt policies consistent with these rights. Policymakers who insist on adopting policies that run against the grain of human nature will be voted out of office. Knowing this, candidates will endorse only those policies broadly consistent with human rights, in the sense of those conceptions of right that correspond with human nature. This suggests that natural rights arguments will be most value in seeking to shame authoritarian regimes or terror groups into modifying their behavior, or perhaps to mobilize persons to overthrow these regimes.

¹⁴ See FRIEDRICH A. HAYEK, *THE CONSTITUTION OF LIBERTY* (U. of Chicago Press, 2011) (1960).

Against these positive implications, I see at least two important qualifications. The first can be called the is-ought problem.¹⁵ The conception of human nature I envision is based on scientific investigation into the biological forces that condition the way humans behave. This is an understanding of fact -- of the way people actually behave. Arguments from natural rights, in contrast, are necessarily normative propositions. They set forth propositions about the way people and institutions ought to behave. It is often said that one cannot derive an ought from an is, that it would be a "category mistake" to try to derive normative propositions, i.e., natural rights, from studies of the biological foundations of human nature.¹⁶

This objection is sound, and it is important to stress that political and moral philosophy must always rest on normative propositions other than the biological roots of human behavior. An evolutionary biologist would say that our genetic endowment is based on the behaviors that have had the most success in replicating themselves over the course of human evolution.¹⁷ These behaviors are not necessarily the same as those that would maximize human happiness, which is what a utilitarian theory, for example, would posit as the touchstone for judging human institutions and behaviors from a normative point of view. Genghis Khan may have been the most successful human in history in term of spreading his genetic material among biological descendants; but he did this largely by raping large number of women in societies subjugated by his warriors.¹⁸ I doubt very much if anyone today would want to offer this

¹⁵ DAVID HUME A TREATISE OF HUMAN NATURE 469-70 (Oxford Press 1968) (1739).

¹⁶ The point is that one cannot deductively derive normative propositions from propositions of fact. It does not follow, however, that normative propositions are purely "emotive" and hence are immune from reason or argument. See ALASTAIR MACINTYRE, AFTER VIRTUE: A STUDY IN MORAL THEORY 6-34 (U. Notre Dame Press, 1981).

¹⁷ E.g., RICHARD DAWKINS, THE SELFISH GENE (Oxford U. Press 1989) (1976).

¹⁸ COCHRAN & HARPENDING, *supra* at 106; see Tatiana Zerjal et al., *The Genetic Legacy of the Mongols*, 72 AM. J. HUM. GENET. 717 (2003) (claiming that about 8% of the

behavior as a moral or ethical ideal by which to judge either individuals or human institutions.

It does not follow, however, that we should insist on a normative framework for evaluating human conduct that ignores human nature – or that adopts a wholly unrealistic theory of human nature. Surely one test of any normative theory is its realism, the prospect that if it were put into effect it would actually have some effect on the way people behave. If our knowledge of human nature cannot generate a theory of natural rights, it would nevertheless be folly to insist on a theory of natural rights that proceeds in blissful ignorance of our expanding knowledge of human nature. Which, I am afraid, is an all too fair characterization of some of the argument today that proceeds under the banner of universal human rights.

The second troublesome issue, to be blunt, can be called the Adolph Hitler problem. The Nazis believed in the superiority of what they called the Aryan race, and they believed that this had a biological basis.¹⁹ This led, of course, to terrible atrocities – the holocaust, the forced sterilization of the mentally impaired, eugenic experiments on prisoners. We in the United States also bear a severe burden of racism, in the form of a system of slavery that was constructed along racial lines, followed by years of Jim Crow laws and enforced racial segregation.²⁰ These discriminations were also justified by racial theories, which again were assumed to have a biological basis. Once Nazism was defeated at great cost, and once the United States began to break free of Jim Crow laws and enforced segregation in the 1960s – again after a very long and trying struggle -- there has been an understandable tendency to banish any type

men in 16 populations throughout a large region of Asia are likely to be male-line descendants of Genghis Kahn based on surveys of DNA variation).

¹⁹ CHRISTOPHER BROWNING, *THE ORIGINS OF THE FINAL SOLUTION: THE EVOLUTION OF NAZI JEWISH POLICY* (Neb. U. Press., 2004).

²⁰ See MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS* (Oxford U. Press, 2004).

of social thought that might lead to a recurrence of these atrocities. Any talk about a biological basis for human nature is therefore likely to trigger sharply negative responses from those who are sensitive to the dangers of racism in all its forms.

There are a number of responses to this concern. One is that the racial theories of the Nazis and the segregationists were based on quackery, not serious science.²¹ The biological propositions trotted out in support of the ideas of racial hierarchy are regarded today as laughable. Such biological inquiry as existed was driven by a prior commitment to racism, not the other way around.

A second point in response is that the recent discoveries about human nature largely concern the commonalities among all human beings, not their differences along racial or similar lines. The dominant focus in the more recent explosion of research into biological roots of human nature is on human faculties – like the ability to learn language – that are shared by all human groups. The fact that there may be biological differences among human groups is not directly relevant to such a project, other than perhaps to inject a note of caution about what can and cannot be claimed to be a human universal.²²

A third point in response is that it is futile to banish the recent discoveries about the biological foundations of human nature from discourse about political and moral theory. No doubt some – especially those most strongly committed to racial and social equality -- may wish these discoveries away, under the apprehension that any acknowledgment of a biological basis for human behavior puts us

²¹ NICHOLAS WADE, *A TROUBLESOME INHERITANCE: GENES, RACE, AND HUMAN HISTORY* 16-38 (Penguin Press, 2014).

²² This is not to suggest that there are not important genetic variations among humans. For example, evidence has been developed suggesting there is a genetic mutation associated with a propensity for certain types of hyper-aggressive or anti-social behavior. WADE, *supra* note 21, at 53-57. My point is that these sorts of intra-species differences, based perhaps on genetic mutation, are not relevant to developing a conception of human nature grounded in universal innate human proclivities.

on a slippery slope to racism.²³ But absent a repeal of the First Amendment, it will be impossible to suppress all discussion about the implications of the new science of human behavior for social policy.²⁴ Suppression may work for a while in academic circles, where groupthink holds sway today more than ever. Outside of academia, however, we have seen a recent spate of books by journalists and academics in non-policy oriented fields -- like the *New York Times* science writer Nicholas Wade²⁵ and the Harvard psychologist Steven Pinker²⁶ -- who are willing to speculate about the implications of the converging studies that point to a set of universal human behaviors grounded in biology. As the scientific research continues to mount, and these sorts of ruminations proliferate, the bastions of academic discourse about political and moral theory -- including law schools -- will be forced to incorporate the new learning into their work. The objective should be not to censor the new learning, but to incorporate it in a wise way.

II.

I turn now to possession. As a preliminary matter, it will be useful to draw some distinctions in order to avoid unnecessary confusion associated with the protean meanings of two words: possession and property.²⁷ To illustrate the distinctions, I will make refer-

²³ STEVEN PINKER, *THE BLANK SLATE: THE MODERN DENIAL OF HUMAN NATURE* 108-20 (Penguin Books, 2002) (recounting hostility to the initial exposition of sociobiology by E.O. Wilson and others).

²⁴ See *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967) (stating that “academic freedom” is a “special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom”).

²⁵ WADE, *supra* note 21.

²⁶ PINKER, *supra* note 23.

²⁷ For further treatment of the distinction, see Thomas W. Merrill, *Ownership and Possession*, in *THE LAW AND ECONOMICS OF POSSESSION* (Yun-chien Chang ed., Cambridge U. Press 2015).

ence to certain situations involving the seats in a college football stadium.

Possession is often used to refer to a fact, which we can call possession-in-fact. We speak of possession in this sense when someone is in actual control of an object, meaning she is in a position to exclude others from the object. Suppose you enter a college football stadium and approach seat 305 in an open seating section. Someone, call her Mary Sue, is sitting in seat 305. She is in possession of the seat, in the sense of possession-in-fact.

Now suppose your turn to the next seat, number 306. There is no one sitting in it, but you notice that a jacket has been draped over the back of the seat, which obviously does not belong to Mary Sue, because she is already wearing a jacket. You infer from these facts that seat 306 has been claimed by someone else, who is temporarily absent but intends to return and occupy the seat. We can refer to this as intended possession. Possession in fact has been established by someone, but that person has temporarily relinquished active control of the object, while intending to resume control in the near future.

Now we can ask, what is likely to be your response to the circumstances presented by seats 305 and 306? If you are a normal, minimally-socialized individual, you will move along to the next available seat that is neither occupied by a person nor marked in such a way as to indicate that a person has claimed it and intends to return. You will not, almost assuredly, seek to grab Mary Sue and throw her out of seat 305. Nor is it likely that you will grab the jacket draped over seat 306, fling it aside, and flop yourself down on 306. We can call the behavior you are exhibiting respect for possession established by others, or respect for possession for short.

So now we have three concepts to keep in mind in what follows: possession in fact; intended possession; and respect for possession.

A fourth concept I will call property. Property is another term of many meanings, but I will use it to refer to legally enforceable claims on resources. Unlike possession, which can operate purely as a social norm, property (as I define it) requires a functioning legal

system.²⁸ Property comes into play when you have certain claims on resources that will be backed up by the state, usually in the form of a system of courts. Suppose that in your quest for a seat in the stadium you look up, and see a row of glistening skyboxes looming above the open seating area you have been exploring. Through the glass fronting the skyboxes, you can see people sitting in comfortable chairs, conversing and eating hors d'vours as they wait for the game to start. You know you have no business going up there to look for a seat, because the seats in the sky boxes are property. You are almost certainly unfamiliar with the details – whether they are leased or owned or what. But you know you would have to get the advance permission of the owner of one of the seats to sit there, even if the seat is currently empty. If you attempted to occupy a seat without permission, you could be in trouble, if only because a security guard will throw you out.

The thesis I would like to propound is this: The possession concepts – possession in fact, intended possession, and respect for possession – are all part of human nature, in these sense that they are proclivities or instincts that have a biological foundation and are found in all human societies. Collectively, we can call these phenomena the “possession instinct.” Property, as I have defined it, being an institution that does not exist without a legal system, is not a universal feature of all human societies, for the obvious reasons that not all human societies have legal systems. Nevertheless, as I shall argue in the next part of the lecture, property systems draw heavily upon, and derive much of their legitimacy and efficacy from, mimicking or synchronizing with possession.

How do we know that there is a possession instinct? That is, how do we know that the family of possession concepts has a biological foundation? We do not know this directly. No one has iden-

²⁸ Merrill, *supra* note 27.

tified a possession gene or collection of genes, and no one has determined that part of the human brain is responsible for producing respect for possession established by others. I would not be surprised if we do develop this knowledge some day. But we are not there yet, in significant part because geneticists and neuroscientists have not been interested in looking for the biological roots of possession. Instead, we must be content with indirect and circumstantial evidence. In my view, the evidence is compelling. But you will have to judge for yourself.

One type of circumstantial evidence is the ubiquity of possession-behavior in the world around us. I will not rehash the use of possession in establishing rights to wild animals or claims to lost property. These will be familiar to you from first year property, and they support my thesis, but frankly they are a bit exotic from the perspective of modern life. Consider instead how widespread possession phenomena are, even in a world in which most things of value are owned as property. Parking places for cars, either on the street or in parking lots, are typically allocated by possession. Offices and workstations in firms are allocated by possession. Spots on the beach are allocated by possession. Coat racks and umbrella stands operate on the principle of possession. Queuing - whether for taxis, airline security checks, grocery store cashiers, or the chance to buy a new iPhone -- is a type of allocation by possession. Indeed, the seats in this auditorium were allocated by possession as you filed in. This behavior is not unique to the United States or Western culture, but can be found throughout the world.

Another observation: perceptions of possession, especially possession in fact but also intended possession, typically occur rapidly and automatically, without conscious thought. Perceptions of possession exist in the cognitive realm that Daniel Kahneman calls Sys-

tem 1 or thinking fast.²⁹ When you entered this room you did not have to devote any intellectual effort to perceiving which seats were taken, which had been claimed by someone who intended to return, and which were open. Your brain processed this information without thinking about it. This feature of possession has been obscured by property teachers, who love to dwell on a small number of cases in which claims of possession are contested, such as the dispute between Pierson and Post over who was first to possess the fox.³⁰ Such cases are fascinating, and we can learn important things about possession by studying them. But the reality is that 99.9 percent of the time, our perceptions of possession are made effortlessly and unconsciously, and are not challenged by others who are processing the same information. Indeed, this is how we successfully navigate through daily life without significant conflict over the thousands of items of value that cross our paths.

A third observation: the signs or symbols that mark something as possessed or as something intended to be possessed undoubtedly have a significant cultural element. As Bob Ellickson demonstrated in his famous study of whaling communities, different communities used different signs for establishing possession of a whale.³¹ Some used harpoons attached by a line to the whaling boat, others used bomb lances with colored flags attached to them. What I find remarkable about these conventions, however, is how easily and rapidly they are learned by persons who enter into the community. No one needs to go to school to learn the signs of possession. We pick them up simply by observing how people behave around us. As human interaction expands in a globalizing world, the signs quickly

²⁹ DANIEL KAHNEMAN, *THINKING, FAST AND SLOW* (Farrar, Strauss, and Giroux, 2011).

³⁰ *Pierson v. Post*, Cai. R. 175 (N.Y. Sup. Ct. 1805).

³¹ Robert C. Ellickson, *A Hypothesis of Wealth-Maximizing Norms: Evidence from the Whaling Industry*, 5 J.L. ECON. & ORG. 83 (1989).

become standardized around the world. My favorite example is suitcases discharged at luggage carousels in airports. As air travel has become increasingly common and has extended into all corners of the world, the cultural signs of possession of a piece of luggage have become the same everywhere. Thousands of people get off airplanes at JFK every hour from all over the world, and each can claim his or her luggage with virtually no dispute over who is entitled to what, because the relevant signs of intended possession of luggage are now universal.

Is there anything to say in the way of more solid evidence, of the sort that would be credited by persons of a more scientific cast of mind? Not a huge amount, unfortunately. But what there is confirms the conclusion I have just drawn based on common observation.

One type of evidence comes from anthropological studies of preliterate human societies. Anthropologists have long debated whether these societies recognize "property." Some say property is universal,³² others say it is not.³³ I suspect this disagreement is largely a product of ambiguity about what it means to label something property. What is not a matter of disagreement is that gift-giving is widely if not universally observed in preliterate societies, either informally within family groups or clans or on a more organized basis between larger territorially defined groups interacting with other groups.³⁴ It takes only a moment's reflection to realize that gift giving, whether organized or not, is not possible unless the participants recognize the concept of possession and respect possession established by another. If I have an object, say an elaborately

³² E.g. DONALD E. BROWN, *HUMAN UNIVERSALS* (McGraw Hill, 1991); Martin J. Bailey, *Approximate Optimality of Aboriginal Property Rights*, 35 J. L. & ECON. 183 (1992).

³³ E.g., MARSHALL SAHLINS, *STONE AGE ECONOMICS* (U. Chicago Press, 1972).

³⁴ E.g., John F. Sherry, *Gift Giving in Anthropological Perspective* 10 J. CONSUMER RES. 157 (1983). The classical study is MARCEL MAUSS, *THE GIFT: FORMS AND FUNCTIONS OF EXCHANGE IN ARCHAIC SOCIETIES* (W.W. Norton & Co. 1990, W.H. Halls trans.) (1950).

carved knife, and I want to give it to you, then you must recognize and respect that I have possession and I must recognize and respect that I am transferring possession to you. Any human group that recognizes gift-giving must therefore also recognize possession and respect for possession.³⁵ Since, accordingly to the anthropologists, gift-giving is widespread if not universal in human communities, it follows that possession and respect for possession must also be widespread if not universal in these communities.

A second source that supports some kind of possession instinct is found in the voluminous literature on the endowment effect.³⁶ These studies nearly all show that individuals ask more to give something up, like a coffee mug, than they are willing to pay to acquire it from some one else. The experimental psychologists who first uncovered the endowment effect attributed it to what they called “loss aversion”: people experience the pain of loss more acutely than the pleasure of gain.³⁷ Thus, they demand more to give up a mug than they are willing to pay to acquire one. Other experimental psychologists disagreed, and attributed the endowment effect to what they called “ownership.”³⁸ In other words, the willingness to pay/willingness to accept disparity comes about because we grow attached to things that we regard as our own. As usual, most of the studies do not distinguish clearly between possession and property; in the typical experiment, the “endowment” includes both, at least implicitly.

³⁵ PHILIPPE ROCHAT, *ORIGINS OF POSSESSION: OWNING AND SHARING IN DEVELOPMENT* 253 (Cambridge U. Press, 2014).

³⁶ See Russell Korobkin, *The Endowment Effect and Legal Analysis*, 97 NW. U. L. REV. 1227 (2003) (providing an overview of studies).

³⁷ E.g., Richard Thaler, *Toward a Positive Theory of Consumer Choice*, 1 J. ECON. BEHAV. & ORG. 39 (1980).

³⁸ E.g., Carey K. Morewedge et al., *Bad Riddance or Good Rubbish? Ownership and not Loss Aversion Causes the Endowment Effect*, 45 J. EXPERIMENTAL SOCIAL PSYCHIATRY 947 (2009).

But one study in particular caught my eye. Joachen Reb and Terry Connolly carried out experiments with business students in Singapore expressly designed to differentiate between experimental subjects given possession of an object but not ownership, and subjects given ownership but not possession.³⁹ The results were striking: “We found a significant effect of possession, but no significant effect of factual ownership.”⁴⁰ Unfortunately the authors, echoing another strand in the psychological literature, attributed the influence of possession to what they called “psychological ownership.” The possibility that possession itself might be triggering the endowment effect was evidently too simple to be given credence. Nevertheless, I find the results here highly suggestive that perceptions of possession trigger changes in behavior in ways that are ingrained in human psychology.

A third source that supports the existence of a possession instinct consists of studies of infant behavior. Especially illuminating, in my view, is the work of Lita Furby, based on studies of young infants in Israel and the United States.⁴¹ Furby concluded that the understanding of possession typically develops in the second year of a child’s life, before they develop any ability to speak. She hypothesized that there are two components of infant behavior that combine to produce this understanding. The first she called “effectance motivation,” which is a drive to produce effects on the external environment, in other words, grabbing, touching, putting into the mouth, etc. any and all sorts of objects with which the infant comes into contact.⁴² The second component was the threat that this exploratory behavior has for the infant and the surround-

³⁹ Jochen Reb & Terry Connolly, *Possession, Feelings of Ownership and the Endowment Effect*, 2 JUDGMENT & DECISION MAKING 107 (2007).

⁴⁰ *Id.* at 112.

⁴¹ Lita Furby, *The Origins and Early Development of Possessive Behavior*, 2 POL. PSYCHOL. 30 (1980). For a more recent summary of studies, offering a more Freudian perspective, see ROCHAT, *supra* note 35, at 178-93.

⁴² Furby, *supra* note 41, at 36.

ing environment. This results, as Furby puts it, with adults and older siblings expending significant effort “to prevent the child from interacting with many objects.”⁴³ The result of this prolonged struggle is that the child gradually learns which objects she can grab and touch, and which ones are off limits; the distinction between mine and not-mine.

What I find especially intriguing about this account is its combination of biological and culturally-contingent elements. Furby noted that “effectance motivation” is very likely a universal trait in all human infants. It is hard-wired in human behavior. The fact that limits are imposed on the infant’s exploratory behavior also appears to be universal, in the sense that “it is hard to imagine” a society in which no such limits would exist. But, of course, the exact content of the limits – where the line will be drawn between what can be grabbed and grasped and what is off limits – will differ from one culture to another. Thus, the concept of possession, in the sense of the differentiation between objects that are mine and not mine, is universal in all human societies. But the set of objects that are subject to claims of possession, and the markings that are used to differentiate those objects from other things, will vary from one culture to another.

A final source is observational studies of animal behavior. Biologists have long observed a “territorial” instinct in a wide variety of animal species.⁴⁴ Less well known is that animals also show respect for possession of objects by other members of the same species. Respect for possession has been observed in wide variety of animals, ranging from porpoises, to chimpanzees, to Western scrub jays.⁴⁵ Studies of primates are especially revealing, given their evolutionary proximity to humans. In one study involving macaques, re-

⁴³ Furby, *supra* note 41, at 34.

⁴⁴ E.g., ROBERT ARDREY, *THE TERRITORIAL IMPERATIVE* (Atheneum Press, 1966).

⁴⁵ DALE PETERSON, *THE MORAL LIVES OF ANIMALS* 156-72 (Bloomsbury Press, 2011).

searchers observed that when a dominant primate attempted to take a food tube from a subordinate primate in the presence of other group members, “the subordinate will scream, drawing the attention of third parties, who frequently force the dominant individual to desist.”⁴⁶ Reviewing a number of studies, Herbert Gintis reports that “the taking of an object held by another individual is a rare event in primate societies.”⁴⁷ In other words, primates exhibit respect for possession established by other primates. It is very unlikely that this is a product of socialization into the norms of Chimpanzee culture. It must have a significant genetic foundation.

Collectively, these sources strongly suggest that possession and respect for possession established by others appears to be a universal attribute of human psychology.⁴⁸ In other words it is in our genes, at least in part, having been selected out for its superior survival value over the millennia. This does not mean that the ability to identify possession and respect for possession is some kind of automatic reflex, like blinking in bright light. The set of objects eligible for possession and the signs that communicate claims of possession are clearly established by culture. But there is a strong predisposition toward recognizing and respecting possession, enough to make judgments about possession virtually automatic, once one assimilates the basic communicative signals of the culture. In this sense, the possession instinct can be said to be part of human nature.

⁴⁶ *Id.* at 7 (citing H. Kummer & M. Cords, *Cues of Ownership in Long-tailed Macaques, Maccaca Fascicularis*, 42 *ANIMAL BEHAVIOR* 529 (1991)).

⁴⁷ Herbert Gintis, *The Evolution of Private Property* 64 *J. ECON. BEHAV. & ORG.* 1, 7 (2007).

⁴⁸ Lee Ellis, *On the Rudiments of Possessions and Property*, 24 *SOC. SCI. INFO.* 113, 121 (1985); see also ROCHAT, *supra* note 33, at 251 (concluding that despite cultural variations “possession as an experience of power within the group seems to be universal”).

III.

What then is the answer to the question implicit in the title of this essay? Is possession a natural right? The answer has already been intimated. The mere fact that the possession instinct is part of human nature does not mean that there is a natural right to possession. One cannot leap directly from is to ought. However, once we understand that possession and respect for possession are deeply engrained in human nature, we can come to a better understanding of the constraints that operate on any system of property. The following is by no means an exhaustive account of the implications, but is meant to be suggestive only.

One implication concerns the recurring dream of Marxists and various utopians to abolish private property.⁴⁹ Technically, it is possible to eliminate private property, as I have defined it, as a legally enforceable right of individuals to control the use of particular resources. One simply has to close the courthouse doors to those seeking redress for things taken by others or to constrain seizures of things by the state. It may be that some organized polities, such as contemporary North Korea, have managed to realize such a state of affairs.

But I think it is impossible to have an organized human society in which respect for possession established by others has been eradicated. Descriptions of life in North Korea, for example, confirm that individuals continue to have unique claims to items of personal property like clothing and grooming instruments as well as to simple modes of transportation like bicycles and (for the affluent) television sets.⁵⁰ Whether or not these claims of possession would be enforced by a court, they are clearly respected by others and by the

⁴⁹ See, e.g., KARL MARX & FREDERICK ENGELS, *THE COMMUNIST MANIFESTO* 84 (Harlan Davidson, 1955) (1848).

⁵⁰ BARBARA DEMICK, *NOTHING TO ENVY: ORDINARY LIVES IN NORTH KOREA* 14, 33, 77 (Spiegel & Grau, 2009).

government. The same was apparently true in Soviet Russia, Castro's Cuba, and Mao's China, even during the most ruthless years of official hostility to private property. It is not possible to dismiss these vestiges of "possessive individualism" as a mere function of the administrative costs of collectivizing the control over shoes and toothbrushes. Respect for possession emerges spontaneously and persists with respect to things closely associated with persons, and a government committed to stamping out these proclivities would have a herculean task beyond the capacities of the even the most fanatical and ruthless regime.

If there are constraints on how far modern societies can go in eradicating property, because of the possession instinct, there are also limits on how far societies can go in extending the protections associated with property to resources that have no tangible dimension, and hence cannot be possessed in any ordinary sense. Consider in this regard the vexed status of intellectual property in a world in which intellectual goods are distributed by digital signals. The property right in intellectual property is the intangible right to prevent the use or the copying of particular intellectual goods. Being intangible, it is not possible, strictly speaking, to possess an intellectual property right. This suggests that IP rights will suffer from congenital weakness relative to possessory property rights, such as land and chattels. Specifically, IP rights lack the intuitive force associated with possessory rights, which lends legitimacy and facilitates enforcement of possessory property rights.

Historically, IP rights were able to overcome this weakness, at least to a significant degree, because IP rights were embodied in tangible things, which in turn could draw upon the intuitive force of possession. Thus, patents were embodied in particular machines or chemicals, and if one attempted to create an equivalent machine or chemical by reverse engineering without a license from the patent holder one was guilty of infringement. It was fairly easy for people involved in manufacturing to think that the patented machine or chemical stamped with a patent number was a "thing" which they could not use or copy without permission. Similarly, copyrights were embodied in particular writings, like books or

sheet music, again stamped with a copyright notation. If one attempted to copy the book or the sheet music, and distribute it without a license, one was guilty of infringement.

Once intellectual property took on the form of bits of digital information, the association between IP and possessory rights became much more attenuated, if it did not disappear altogether. This explains the modern phenomenon of mass violation of intellectual property rights embodied in digital material, especially copyrights. Young adults who would not think of stealing a book from a bookstore or a videotape from a video store apparently think there is nothing wrong with downloading pirated movies and TV shows from the internet. According to a recent *New York Times* article, over 10 billion movies, television shows and games were downloaded in the second quarter of 2014, and only about 6 percent of these downloads were legal.⁵¹ A recent survey by scholars associated with Columbia University found that 70 percent of young adults between 18 and 29 have copied or downloaded digital material without paying license fees, and almost 30 percent get most of their digital material that way.⁵² According to the *Times*, “[t]he pervasive cultural norm, especially among younger people, is that illegal downloading, at least when it involves material from big corporations, is no big deal.”⁵³

No doubt there are multiple reasons for the mass indifference to internet pirating. But a key factor, in my view, is that digital downloads are completely severed from any perception that one is interfering with possession established by another. Digitalized IP rights

⁵¹ Jenna Wortham, *The Unrepentant Bootlegger*, N.Y. TIMES, Sept. 28, 2014, at B1, available at http://www.nytimes.com/2014/09/28/technology/the-unrepentant-bootlegger.html?_r=0.

⁵² JOE KARAGANIS & LENNART RENKEMA, COPY CULTURE IN THE US AND GERMANY 5 (The American Assembly, 2013).

⁵³ Wortham, *supra* note 51.

therefore suffer from a legitimacy gap relative to rights that draw on the natural respect afforded to possession.

The possession instinct can help explain other longstanding puzzles in the law of property. One concerns the difference in the nature of the protection afforded to property by the actions in trespass and nuisance.⁵⁴ An intentional trespass is subject to a strict and unyielding doctrine that makes no inquiry into the reasonableness of the defendant's action, requires no proof of actual harm and readily translates into injunctive relief. An intentional nuisance, by contrast, is governed by a situation-specific balancing test that generates liability only if the intrusion is unreasonable, requires a showing of substantial harm and often remits the successful plaintiff to a recovery of damages rather than injunctive relief.

Once we grasp the systemic importance of the possession instinct, however, there is a simple explanation for the disjunction. Trespass entails an invasion of property by objects sufficiently large to deprive the owner of possession of a portion of the property. Given the widespread respect for possession established by others, an intentional trespass represents a fundamental disruption of the normative order on which property law is built. In contrast, nuisance entails irritants that diminish the use and enjoyment of property, but do not deprive the owner of possession. Nuisance implicates only the need for accommodation of conflicting interests between neighbors regarding the proper use of property. Not surprisingly, the law drifts toward a balancing test and a reasonableness inquiry because nuisance elicits more complex response from the public.⁵⁵

⁵⁴ *Adams v. Cleveland-Cliffs Iron Co.*, 602 N.W. 2d 215 (Mich. App. 1999); see generally Thomas W. Merrill, *Trespass, Nuisance, and the Costs of Determining Property Rights*, 14 J. LEGAL STUD. 13 (1985).

⁵⁵ Compare RESTATEMENT OF TORTS § 157 (trespass liability) with *id.* § 826 (nuisance liability).

The law of takings reflects a similar divide. One of the great puzzles for an economist is the intense hostility of the public to takings by eminent domain, as reflected in the backlash to the *Kelo* decision,⁵⁶ combined with the relative indifference to regulatory takings as reflected in restrictive zoning laws and the like.⁵⁷ Economists note that takings by eminent domain are always compensated, whereas regulatory takings almost always go uncompensated. Consequently, eminent domain should result in relatively efficient decisions about when and what to take because the power is constrained by the requirement of paying the opportunity cost of the property taken. Restrictive land use regulations, in contrast, often impose severe costs on owners, which regulators have little incentive to take into account in their decision making. Judging by the hoopla over *Kelo*,⁵⁸ however, the public is more exercised by invocations of eminent domain than it is by uncompensated land use regulations.

The disjunction in attitudes is again explainable in terms of possession. Takings by eminent domain deprive owners of possession against their will. Zoning and other types of land use regulation leave possession intact, and affect only the permissible uses of the land. The typical “ordinary observer” of these different types of government action regards the deprivation of possession as a much more significant intrusion upon owner prerogatives, even if the taking will be accompanied by compensation.⁵⁹ Here, we can see how public sentiment, driven by the possession instinct, can cause public policy to diverge from what a purely utilitarian analysis might suggest.

⁵⁶ *Kelo v. City of New London*, 545 U.S. 469 (2005).

⁵⁷ See, e.g., WILLIAM A. FISCHER, *REGULATORY TAKINGS: LAW, ECONOMICS, AND POLITICS* 67-77 (Harvard Press 1995).

⁵⁸ See Ilya Somin, *The Limits of Backlash: Assessing the Political Response to Kelo*, 93 MINN. L. REV. 2100 (2009).

⁵⁹ BRUCE A. ACKERMAN, *PRIVATE PROPERTY AND THE CONSTITUTION* 15-20 (Yale Press 1977) (characterizing the perceptions of the “ordinary observer”).

Another mystery, again from constitutional law, involves the role of notice of future government regulation in the law of regulatory takings. The general question is whether a property owner who has notice of a regulatory scheme at the time he or she acquires property is barred from challenging the scheme as a taking once the regulation bites. The Supreme Court has behaved quite inconsistently in the face of these claims. It has held that notice of future regulation qualifies contract rights,⁶⁰ security interests,⁶¹ intellectual property rights⁶² and government entitlement programs.⁶³ When faced with notice of future regulation of real property, however, the Court has balked at qualifying rights, stating that the state may not “put an expiration date on the Takings Clause” by “putting so potent a Hobbesian stick into the Lockean bundle.”⁶⁴ Some might chalk this up to a fetishistic attachment to property in land. But the inconsistency dissolves, once we understand that rights grounded in possession are likely to be more durably rooted in human nature. All the rights the Court has suggested can be prospectively extinguished by notice are intangible, i.e., rights incapable of possession. So far, the Court has been unwilling to allow notice to defeat claims involving possessory rights.

A final illustration is the law of adverse possession. No matter how committed the legal system may be to the formal title registration, every modern legal system recognizes an exception for posses-

⁶⁰ *Ogden v. Saunders*, 27 U.S. 213 (1827) (obligation of contract may be modified prospectively through the creation of a state insolvency proceeding applicable to future contracts).

⁶¹ *United States v. Security Industrial Bank*, 459 U.S. 70 (1982) (semble) (prospective elimination of security interest in property exempt from discharge in bankruptcy is permissible).

⁶² *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984) (notice that government will disclose trade secrets filed with it in the future eliminates any claim under the Takings Clause).

⁶³ *Bowen v. Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41 (1986) (prospective elimination of Social Security benefits is permissible).

⁶⁴ *Palazzolo v. Rhode Island*, 533 U.S. 606, 627 (2001).

sory claims that have been openly and consistently maintained in opposition to the registered title.⁶⁵ When push comes to shove, possession trumps property. There are various utilitarian explanations for this,⁶⁶ but the possession instinct also tells us that we should not be surprised. Public sentiment will tend to favor a possessor who has established open, notorious, and continuous control over something relative to an owner who has abandoned or has never taken up possession. With sufficient passage of time, the law bends to this force by giving the possessor a title superior to that of the owner.

The possession instinct is not merely a constraint on what societies can do in the way of structuring the institution of property. If properly harnessed, the possession instinct is also a powerful force that can make property rights more useful and secure. The most general strategy here is to design property rights so that they mimic the key features of possession. Possession-in-fact entails exclusion, and intended possession entails an intention to exclude in the future. It should come as no surprise, therefore, that property rights always entail as one of their features the *right* to exclude others from the owned object.⁶⁷ Property – at least property that is capable of being possessed -- entails the legal right to determine who will be in possession. There are of course other important attributes of property, such as the right to include others, to use, to consume, to transfer, and so forth. But none of these appears to be a necessary condition of recognizing something as property.

Why is the right to exclude an ever-present feature of property, as opposed to something else, like the right to use or the right to be included? The possession instinct can supply the answer.⁶⁸ Because

⁶⁵ BENITO ARRUNADA, INSTITUTIONAL FOUNDATIONS OF IMPERSONAL EXCHANGE 56 (University of Chicago 2012).

⁶⁶ See, e.g., Thomas W. Merrill, *Property Rules, Liability Rules, and Adverse Possession*, 79 NW. U. L. REV. 1123, 1128-38 (1985).

⁶⁷ Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730 (1998).

⁶⁸ Thomas W. Merrill, *Property and the Right to Exclude II*, 3 BRIGHAM-KANNER PROPERTY RIGHTS CONF. J. 1, 13-21 (2014).

possession and respect for possession are phenomena that dominate our interactions with valued objects in everyday life, property and possession must remain closely synchronized. One could say that property has to mimic possession, so as to allow the institution of property to mesh with the instinct that organizes most of our daily interaction with things of value. Given that possession is grounded in exclusion— either the fact of exclusion or the perception that someone has the intention to exclude others from the thing — property must also be anchored to exclusion, in this case the legal right to exclude. If possession were grounded in one concept (exclusion), and property were grounded in another concept (such as need, or desert, or whatever), there would be too much cognitive dissonance for the system to bear.

To drill down a bit deeper, harmonizing the institution of property with the possession instinct has three powerful advantages. They can be summarized in three terms: legitimacy, information costs, and transaction costs.

First, by constructing a system of property on the foundation of possession we immeasurably enhance the legitimacy of property rights. If, as I have argued, perceptions of possession and respect for possession established by others are universal features of human societies, then a system of property rights that is keyed to possession will capitalize on these features of human nature. If property is seen as being linked to possession, property will likely be regarded as highly legitimate. We can rely primarily on everyday morality and social norms to protect property rights.⁶⁹ Intervention by the police and the courts will be episodic, and when it occurs it will likely reinforce the everyday morality and the social norms that sustain the institution on a day-to-day basis. If property were based on something else — social class or connections to the right leaders or

⁶⁹ Thomas W. Merrill & Henry E. Smith, *The Morality of Property*, 48 WM. & MARY L. REV. 849, 1852-58 (2007).

even moral desert – it would be much less legitimate in the eyes of others.

Second, as mentioned earlier, perceptions of possession are, 99.9 percent of the time, automatic and intuitive. Because the possession instinct is a universal feature of human beings, very young children and strangers can learn to process information about possession without any conscious intellectual effort. This means the information costs of sorting out objects of value according to perceptions of possession are extraordinarily low. Insofar as the system of property draws on possession as a proxy for ownership – which it does in many critical contexts – then the information costs associated with having a system of property are correspondingly reduced.

Third, transaction costs. Here, I would point out that the vast majority of transactions that take place in modern society use possession as a proxy for ownership. When you buy groceries from a market, or clothing from a store, or a bottle of water from a street vendor, technically ownership is being transferred from seller to buyer. But no one in their right mind would do a title search before engaging in such a transaction. The costs would be prohibitive relative to the value of the exchange. Fortunately, we can rely on the fact that the vendor has possession -- both of the objects being sold and of the spot of ground on which the vending operation is located – as proxies for title. And nearly all of the time, this is good enough. As we turn to transactions in more expensive and durable goods -- like real estate, airplanes, and cars -- the calculus changes, and title searching comes into the picture.⁷⁰ But fortunately, possession is available as a proxy for title most of the time, which vastly reduces the costs of transacting, and hence increases the efficiency of exchange.

⁷⁰ Douglas Baird & Thomas Jackson, *Information, Uncertainty, and the Transfer of Property*, 13 J. LEGAL STUD. 299 (1984).

IV.

I will conclude with a brief thought about one of the most longstanding and intractable debates in property theory, namely whether property is a natural right. Locke and his followers like Robert Nozick argue for the natural rights position.⁷¹ Property exists in a state of nature based on acts of first possession. The state and its law are then created for the purpose of protecting property. In opposition, Bentham and his many followers argue for the positive rights position.⁷² Property is a basis of expectation grounded in law. Take away law and there can be no property.

The foregoing account of the possession instinct may provide at least a partial solution to this perennial debate. Respect for possession, as we have seen, is grounded in innate human proclivities, as particularized by social norms and customs. Possession and respect for possession exist in preliterate societies and in social contexts where individuals have no ownership rights. In this sense, possession is "pre-political." Property, in contrast, exists only in the context of a state with formal legal institutions that can authoritatively resolve title disputes. Ownership is definitely "post-political." As we have seen, however, property law has been shaped by possession in many ways, and is critically dependent on possession, with its superior legitimacy, lower information costs, and transaction-cost reducing properties. Property is thus a positive right, but insofar as it builds on and relies on possession, is grounded in a universal pre-political norm.

One implication of this characterization of the issue is that Locke may well have been right, insofar as he was talking about possession. To be sure, one would not want to declare that posses-

⁷¹ JOHN LOCKE, *TWO TREATISES OF GOVERNMENT*, SECOND TREATISE 285-302 (Peter Laslett ed., 1988) (1690); ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 149-64 (1974).

⁷² JEREMY BENTHAM, *THE THEORY OF LEGISLATION* 113 (C.K. Ogden ed. 1931) (1802).

sion is always a natural right. This would entail giving thieves good title to whatever they can pilfer, not to mention allowing unlimited killing of whales. But under the strict limiting conditions that Locke prescribed for thinking about the issue – no prior possession of the item by another, enough and as good left for others, and no waste⁷³ – it may well be appropriate to speak of possession as a natural right.

Bentham, on the other hand, was undoubtedly right insofar as he was talking about rights to resources enforced by the police and the courts. These can only exist as positive rights, created and enforced by the state. Where Bentham and his followers have gone wrong is to imagine that property, being a positive right, can be created or abolished, molded and remolded, in any conceivable fashion suggested by considerations of social utility. The possession instinct, which is part of human nature, cannot be legislated away. It will always exist, in the background, imposing powerful constraints on how far any system of property can deviate from what is acceptable to humankind.

⁷³ LOCKE, *supra* note 71, at 288 (labor confers a right to exclusive possession “at least where there is enough, and as good left in common for others.”).